

SEP 14 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE ALBERTO MICHEL-GARCIA, aka
Jesus Ramirez-Garcia,

Defendant - Appellant.

No. 05-50312

D.C. No. CR-04-01907-TJW

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Thomas J. Whelan, District Judge, Presiding

Submitted September 11, 2006**

Before: PREGERSON, T.G. NELSON, and GRABER, Circuit Judges.

Jose Alberto Michel-Garcia appeals from his 77-month sentence imposed following his guilty-plea conviction for being a deported alien found in the United States, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Michel-Garcia contends that the government produced insufficient evidence to demonstrate clearly and unequivocally that his prior conviction under California Health & Safety Code § 11352(a) qualified as a “drug trafficking offense” for the purpose of a sentencing enhancement under U.S.S.G. § 2L1.2(b)(1)(A).

California Health and Safety Code § 11352 is over-inclusive under the categorical approach of *Taylor v. United States*, 495 U.S. 575 (1990). *See United States v. Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001) (en banc). Therefore, we must employ *Taylor*’s modified categorical approach to determine whether Michel-Garcia’s prior conviction qualifies as a predicate drug trafficking offense. *See id.*

Considered together, the charging document, abstract of judgment, and the change of plea form, which specifically noted that Michel-Garcia pled guilty and admitted that he “sold .08 grams of cocaine,” clearly and unequivocally established that he was convicted of a “drug trafficking offense,” for the purposes of an enhancement under U.S.S.G. § 2L1.2(b)(1)(A). *See Shepard v. United States*, 544 U.S. 13, 21-22, 26 (2005).

AFFIRMED.